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Palila v. Hawaii Department of Land and Natural Resources: State Governments Fall Prey to the Endangered Species Act of 1973*

Jack R. Nelson**

INTRODUCTION

The recent Hawaii federal district court decision in Palila v. Hawaii Department of Land and Natural Resources represents an important step forward in protecting fish and wildlife in the United States under the Endangered Species Act of 1973 (ESA). The decision, which may well have saved a small Hawaiian bird from extinction, represents the first successful suit brought under section 9 of ESA. The case upholds ESA under Congress's commerce and treaty powers, and finds no eleventh amendment bar to its enforcement by private parties against state officials and agencies.

ESA is a comprehensive program for protecting endangered wildlife. It requires the Secretaries of Commerce and the Interior to list...
endangered and threatened species,\textsuperscript{7} including "any species which is in danger of extinction throughout all or a significant portion of its range."\textsuperscript{8} With minor exceptions, ESA prohibits taking, possessing, selling, and importing or exporting a listed species.\textsuperscript{9} Listed species must be preserved until listing is no longer necessary.\textsuperscript{10}

Section 7 of the Act requires all federal agencies to use their authorities to conserve endangered species.\textsuperscript{11} The section requires federal agencies to take affirmative action to conserve endangered species, as well as to refrain from acting unless they can guarantee that their action is not likely to threaten listed species or their critical habitats.\textsuperscript{12} Section 7 has been the primary focus of litigation under ESA, especially in the case of \textit{TVA v. Hill}.\textsuperscript{13} In that case, the Supreme Court enjoined completion of the Tellico Dam and Reservoir Project,\textsuperscript{14} which was being constructed by the Tennessee Valley Authority (TVA), a federally owned corporation.\textsuperscript{15} The reservoir would have inundated the critical habitat\textsuperscript{16} of the snail darter, a species of perch that was added to the list of endangered species in 1975,\textsuperscript{17} eight years after construction of the dam began.\textsuperscript{18} The Supreme Court decision is highly controversial because TVA had spent over $100 million on the project\textsuperscript{19} and had nearly completed it\textsuperscript{20} when it was enjoined.\textsuperscript{21}

Section 9 of ESA prohibits the "taking"\textsuperscript{22} of endangered species by any party or agency.\textsuperscript{23} \textit{Palila} is the first case to invalidate action solely on the basis of that section, and it affirms the power of ESA which was suggested in \textit{TVA v. Hill}. The court in \textit{Palila} held that the Commerce

\begin{itemize}
\item \textsuperscript{7} 16 U.S.C. § 1533(c)(1) (1976 & Supp. IV 1980).
\item \textsuperscript{8} \textit{Id.} § 1532(6) (Supp. IV 1980).
\item \textsuperscript{9} \textit{Id.} § 1538(a) (1976).
\item \textsuperscript{10} \textit{See id.} § 1532(2)-(3) (Supp. IV 1980).
\item \textsuperscript{11} \textit{Id.} § 1536 (1976 & Supp. IV 1980).
\item \textsuperscript{12} \textit{Id.} § 1536(a) (Supp. IV 1980).
\item \textsuperscript{13} 437 U.S. 153 (1978).
\item \textsuperscript{14} \textit{Id.} at 195.
\item \textsuperscript{15} \textit{See} 16 U.S.C. § 831 (1976).
\item \textsuperscript{16} The Secretary designated a stretch of the Little Tennessee River, the sole habitat of the snail darter, a critical habitat in April 1976. 41 Fed. Reg. 13,927-28 (1976); \textit{see} 50 C.F.R. § 17.95(e) (1981).
\item \textsuperscript{17} 40 Fed. Reg. 47,505-06 (1975).
\item \textsuperscript{18} \textit{TVA v. Hill}, 437 U.S. at 157.
\item \textsuperscript{19} \textit{Id.} at 172.
\item \textsuperscript{20} \textit{Id.} at 165-66.
\item \textsuperscript{21} \textit{Id.} at 168, 195.
\item \textsuperscript{22} "Taking" is defined in section 9 as an act "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19) (Supp. IV 1980). The term "harm" is further defined by regulations promulgated by the United States Fish and Wildlife Service to include any "act or omission" causing "significant environmental modification or degradation [that] actually injures or kills wildlife." 50 C.F.R. § 17.3 (1981).
\item \textsuperscript{23} 16 U.S.C. § 1538(a) (1976).
\end{itemize}
Clause\textsuperscript{24} and the Treaty Power\textsuperscript{25} allow Congress to preempt the states in controlling protection of endangered species, even those which are solely indigenous to one state and have no apparent interstate or federal connection.\textsuperscript{26} \textit{Palila} also held that state agencies and officials found to be in violation of ESA may be compelled to take affirmative action under a prospective injunction.\textsuperscript{27} The ancillary cost to the state treasury caused by the injunction is permissible if the injunction is not tantamount to money damages.\textsuperscript{28}

I

STATEMENT OF THE CASE

A. Facts

The Palila\textsuperscript{29} is a member of the Hawaiian Honeycreeper family and is solely indigenous to Hawaii.\textsuperscript{30} The bird has evolved in the ecosystem of the mamane and naio forests of Mauna Kea and is now so uniquely adapted to the mamane-naio forest that it cannot survive without it.\textsuperscript{31} The Palila's bill is shaped to allow it to feed easily upon the seed pods of the mamane,\textsuperscript{32} and the mamane and naio trees provide shelter and nest sites for the Palila.\textsuperscript{33}

The current population of the Palila numbers between 1400 and 1600 birds.\textsuperscript{34} The bird was first designated an endangered species in 1967,\textsuperscript{35} and it remains on the latest list of endangered species published by the Secretary of the Interior under the Act.\textsuperscript{36} In 1977, the U.S. Fish
and Wildlife Service officially designated the critical habitat of the Palila as the remaining ten percent of the bird's historical range,\textsuperscript{37} pursuant to the recommendation of the Palila Recovery Team.\textsuperscript{38} Although the bird currently occupies only seventy to eighty percent of the designated critical habitat, the Recovery Team agreed that designation of the entire area as critical habitat was necessary to allow for population growth and normal flock movements.\textsuperscript{39}

The decline in the Palila population began with the importation of feral\textsuperscript{40} sheep and goats to the slopes of Mauna Kea by early European explorers.\textsuperscript{41} These animals adapted to the island environment quite well,\textsuperscript{42} and the mamane-naio forest became one of their primary food sources.\textsuperscript{43} The sheep and goats browsed the mountain in flocks, consuming leaves, stems, and seedlings of the trees, stripping entire areas and preventing regeneration by eating young shoots and seedlings.\textsuperscript{44} The animals were slowly destroying the mamane-naio forest, thereby reducing the Palila population.\textsuperscript{45} At the time of trial, the sheep and goats populated the Mauna Kea Game Management Area, which encompasses most of the Palila's critical habitat.\textsuperscript{46}

The population of feral sheep on the mountain has fluctuated widely over the years in response to the cyclical effects of hunter pressure and the state's efforts to prevent destruction of the mamane-naio ecosystem.\textsuperscript{47} In the late 1930's the population was over 40,000 head.\textsuperscript{48}


\textsuperscript{38} The Palila Recovery Team was appointed pursuant to ESA, to formulate a plan to restore the Palila to non-endangered status. 16 U.S.C. § 1533 (Supp. IV 1980). The team members included two wildlife biologists employed by the Hawaii Dept. of Land and Natural Resources. 471 F. Supp. at 988 n.4. The Palila Recovery Plan, \textit{supra} note 29 is the product of their research. See 471 F. Supp. at 988.

\textsuperscript{39} 471 F. Supp. at 989.

\textsuperscript{40} “Feral” animals are wild animals that were once domesticated or are descended from domesticated animals. \textit{Id.} at n.8.

\textsuperscript{41} 471 F. Supp. at 989-90. The animals were first introduced to the island in the late 18th century by the English explorer Vancouver. \textit{Id.} at 989 n.8.
Before 1950, the Hawaii Department of Land and Natural Resources (DLNR) attempted to prevent destruction of the mamane-naio forest by eradicating the sheep from Mauna Kea.49 Game hunters, who consider the feral sheep trophy big game,50 objected to the population reduction.51 In response to pressure from these hunters, Hawaii changed its policy in 1950 from one of eradication to one of game management.52 Nevertheless, since that time the sheep population has continued to fluctuate widely, in response to the same conflicting pressures.53 The state never attempted to regulate the goat population, which currently numbers between 200 and 300 animals.54

B. Procedural History

The Palila’s plight attracted the attention of the Audubon Society and the Sierra Club. In 1976, these groups informed the State of Hawaii and the Department of the Interior of an alleged violation by the State of section 9 of ESA.55 When the State failed to take action in response to the danger to the Palila, the Sierra Club and the Audubon Society, in January of 1978, filed suit in federal district court.56 Plaintiffs alleged a violation of section 9 of ESA and sought an injunction requiring the Hawaii DLNR to remove permanently all feral sheep and goats from the critical habitat.57

49. 471 F. Supp. at 989 n.9.
50. Principal Brief for Plaintiffs-Appellees at 19 (quoting J. Giffin, Ecology of the Feral Sheep on Mauna Kea 6 (1976) (80-page study by a wildlife biologist on feral sheep of Mauna Kea)).
52. Id.
53. Id. The population even rose slightly after suit was brought in 1978. Palila v. Hawaii Dep’t of Land & Natural Resources, 639 F.2d at 497.
55. Id. at 991 n.16, 991-92 n.21. Standing to sue for such groups is authorized by 16 U.S.C. § 1540(g)(1) (1976) (granting standing to “any person”) and 16 U.S.C. § 1532(13) (Supp. IV 1980) (defining “person” to include associations). Although the Palila was named as a plaintiff in the suit in an attempt to test its standing to sue, no ruling was made on the issue, since the Sierra Club qualified as a plaintiff on its own behalf. The Sierra Club Legal Defense Fund is still seeking a ruling on standing to sue for animals; it has filed suit in the name of a grizzly bear in Wyoming. Los Angeles Daily Journal, Feb. 13, 1981, at 14 col. 5. See generally Stone, Should Trees Have Standing?—Toward Legal Rights For Natural Objects, 45 So. Cal. L. Rev. 450 (1972); Sierra Club v. Morton, 405 U.S. 727, 741-55 (1972) (Douglas, J., dissenting).
56. Id. at 991 n.16. It should be noted that feral sheep are not the only type of sheep on Mauna Kea. In 1960, the Hawaii Department of Land and Natural Resources (DLNR) introduced Mouflon sheep onto Mauna Kea in an attempt to interbreed them with feral sheep. Id. at 989 n.9. The DLNR believed that the mouflon strain would be less harmful to the mame-naio ecosystem. Id. Although the program was abandoned at the hunters’ request, Mouflon sheep still inhabit Mauna Kea. Id. The effects of these sheep on the mamane-naio forest are not yet known, and a study is being conducted to determine their effect. Id. at 990 n.13. The Recovery Team is convinced that removal of the
The defendants, the DLNR and the Chairman of the Board of Land and Natural Resources, denied any violation and claimed that the sheep and birds could coexist under an "intensive management" program set up to assure protection for the Palila while providing for hunter interests. The defendants also challenged the authority of the United States to enforce ESA against them on behalf of the Palila, alleging state sovereignty over the bird on the ground that it has never moved interstate and that it inhabits only state-owned lands. The judge treated this as a tenth amendment and commerce clause argument, and assumed that the defendants were challenging the power of Congress to enact legislation with a scope broad enough to apply to the situation here.

The trial court found that there was "clearly" a violation of section 9. The court held that the defendants were contributing to a "significant environmental modification or degradation" of the Palila's critical habitat that injures or kills the bird, thereby "taking" the Palila within the meaning of the Act. The court concluded that neither the defendants' program of intensive management nor their proposal to fence off the mountain would adequately protect the mamane-naio ecosystem for the Palila. The court also ruled that Congress had authority to enact legislation broad enough to extend to the Palila, by virtue of two separate federal powers: the power to make treaties, and the power to regulate interstate commerce. First, the judge found that ESA was validly enacted in performance of international treaties under which the United States had pledged itself to protect various endangered species in the world. At least two international treaties specifically require the United States to protect the Palila. Second, the feral sheep and goats would effect a ninety percent remedy of the problem. Id. The suit here did not seek an injunction to require removal of the Mouflon sheep.

58. Id. at 987.
59. See id. at 990.
60. Id. at 992.
61. See id. at 992-95.
62. See id. at 987, 999.
63. Id. at 995 (quoting 50 C.F.R. § 17.3 (1981)).
64. Id.
65. 471 F. Supp. at 991 (citing DEPARTMENT OF LAND & NATURAL RESOURCES, STATE OF HAWAII, THE MAUNA KEA PLAN (1977)). The Board of Land and Natural Resources proposed to fence off portions of the Mamane forest and to establish a year-round hunting season within the fenced off area. Id. The leader of the Palila Recovery Team protested, however, that the sheep would cause even greater damage in the restricted areas. Letter from Dr. Andrew J. Berger to Christopher Cobb, Chairman of the Board of Land and Natural Resources (May 14, 1976). Defendants have not taken any action to implement the fencing plan. 471 F. Supp. at 991.
66. 471 F. Supp. at 990, 991 n.18.
67. Id. at 995.
68. Id. at 993.
69. Id. at 993 (citing Convention for the Protection of Migratory and Endangered
court found that the commerce clause of the Constitution provides a basis of authority for the enactment of ESA.\textsuperscript{70} The judge ruled that the Congressional declaration of the value to the nation of endangered species such as the Palila raises these species to “that level of national concern that invokes the power of Congress to regulate commerce” among the states.\textsuperscript{71} The existence of a national program to protect these species and their environments “preserves the possibilities of interstate commerce in these species and of interstate movement” of people studying them.\textsuperscript{72}

The court ruled lastly on the issue of whether the eleventh amendment deprived it of the authority to entertain a suit by private individuals against a state official and a state agency\textsuperscript{73} or of the authority to grant the requested relief. The court raised this issue on its own initiative.\textsuperscript{74} The court ruled that the eleventh amendment does not prohibit suit against a state official to enjoin that official’s violation of federal law, and that affirmative equitable relief may be awarded although it entails ancillary costs to the state.\textsuperscript{75} The court reasoned that Congress had abrogated the states’ eleventh amendment immunity by authorizing private suits against any “person,” including any “governmental instrumentality or agency,”\textsuperscript{76} and that Hawaii had impliedly consented to this abrogation by adopting its own Endangered Species Act\textsuperscript{77} and by seeking to obtain the federal funds made available by the ESA\textsuperscript{78} to states qualifying for a “cooperative agreement.”\textsuperscript{79} As to the remedy sought, the court ruled that the defendants could be ordered to eradicate sheep and goats from the critical habitat, and ordered counsel for the parties to submit forms of judgment to the court within thirty

\begin{itemize}
\item 70. \textit{Id.} at 995.
\item 71. \textit{Id.} at 994-95.
\item 72. \textit{Id.} at 995.
\item 73. The eleventh amendment to the Constitution states that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI.
\item 74. 471 F. Supp. at 995-96.
\item 75. \textit{Id.} at 999.
\item 76. \textit{Id.} at 997 (quoting 16 U.S.C. § 1540(g) (Supp. IV 1980)).
\item 78. 16 U.S.C. § 1535(c) (Supp. IV 1980). Under this provision, the Secretary of the Interior is authorized to enter into cooperative agreements with states that establish and maintain adequate programs for the conservation of endangered species. \textit{Id.}
\item 79. 471 F. Supp. at 998. The state’s attempt to comply with the cooperative agreements provision failed when the Department of the Interior deemed the Hawaii plan inadequate. \textit{Id.} at 998-99 n.55.
\end{itemize}
days. In an unpublished order, the district court gave the Hawaii DLNR two years to remove all feral sheep and goats from the Palila’s critical habitat.

The defendants appealed the trial court’s grant of summary judgment, contending that material issues of fact existed and that the court had erred in finding a violation of ESA. On February 9, 1981, the Ninth Circuit Court of Appeals affirmed the trial court’s decision, holding that there were no disputed material facts to preclude summary judgment and that the defendants were indeed violating section 9 of ESA by “taking” the Palila.

II
ANALYSIS
A. The “Taking” Issue

Perhaps the most basic issue presented to the district court was whether the defendants had “taken” the Palila within the meaning of section 9. Since that section defines “taking” to include “harm” to an endangered species, the fact that the failure of the state to remove the feral sheep and goats harmed the Palila seems to compel the conclusion that a taking did occur. It might be argued, however, that the state’s failure to remove the animals was an omission rather than an act, and hence that a “taking” had not occurred within the meaning of section 9. Assuming that this characterization of the state’s failure is accurate, the Fish and Wildlife Service regulations would come into play, for they specifically define the term “harm” to include “an act or omission which actually injures or kills wildlife . . . .” The regulations also make more certain the conclusion that the state had “harmed” the Palila, within the statutory definition of a “taking,” by defining the term “harm” very broadly to include “acts which annoy [wildlife] to such an extent as to significantly disrupt essential behavior patterns, which include . . . significant environmental modification or degradation . . . .”

80. Id. at 999.
81. The district court’s final order is examined in the court of appeals’ opinion. Palila v. Hawaii Dep’t of Land & Natural Resources, 639 F.2d 495, 497 (9th Cir. 1981).
82. Id.
83. Id. at 498.
85. See supra text accompanying notes 40-54.
86. For discussion of a similar issue involving the definition of agency action under section 7 of ESA, see Erdheim, supra note 6, at 673-75.
87. The assumption should be made only for the sake of argument. The state’s failure may plausibly be seen as part of its affirmative management of feral sheep and goats, and hence may be qualified as an act rather than an omission.
88. 50 C.F.R. § 17.3 (1981) (emphasis supplied).
89. 50 C.F.R. § 17.3 (1981).
Neither the district court nor the circuit court questioned the validity of these regulatory definitions, apparently assuming that they were within the statutory grant of authority to the Fish and Wildlife Service. This unquestioning acceptance of the regulations may have been prompted by the judicial attitudes in Sierra Club v. Froehlke90 and TVA v. Hill,91 in which a federal circuit court and the Supreme Court, respectively, uncritically applied the Service's definitions of important provisions of section 7 of ESA.

Of course, an agency's regulatory action pursuant to a federal statute may be invalidated if it is found that the agency exceeded its authority or did not act in accord with the intent Congress evinced in passing the statute.92 Thus it is possible that the broad definition of "harm" (to include omissions and acts merely annoying species or disrupting their essential behavior patterns) could be invalidated on such a ground. Support for this position can be found, at least by analogy, in the dissenting opinion of Justice Powell in TVA v. Hill.93 Justice Powell argued that the reach of the regulatory definitions accepted there by the majority "is virtually limitless," and that Congress "would not have gone this far . . . without giving a clear declaration of that intention."94 Justice Powell added that the Court has a duty to adopt "a permissible construction that accords with some modicum of common sense and the public weal."95

The legislative intent underlying ESA, however, seems to negate the argument that the Service's broad definition of "harm" exceeded its regulatory authority. As the Supreme Court noted in TVA v. Hill, the Act represents Congress's intent "to halt and reverse the trend toward species extinction, whatever the cost."96 In light of this intent the Court, in dictum, noted with apparent approval that the Fish and Wildlife Service had provided a definition of "harm" in its regulations enacted pursuant to ESA.97 The Act itself also makes clear its broad intent to secure species preservation. Its stated purpose is "[to] provide a means whereby the ecosystems upon which endangered species . . .

90. 534 F.2d 1289 (8th Cir. 1976).
92. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971) (agency's action valid only if the agency "acted within the scope of [the] authority" conferred on it by Congress).
94. 437 U.S. at 207 n.16.
95. Id. at 196.
96. Id. at 184.
97. 437 U.S. at 184 n.30.
depend may be conserved,” in addition to fulfilling United States treaty obligations. 98 Finally, the legislative history further attests to Congress’s intent to define “taking” very broadly—specifically, “in the broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife.” 99

The 1978 amendments to ESA did not alter this clear congressional intent. Although Congress provided exemptions from section 7 for some major federal projects, 100 the exemptions are narrowly drafted and it is unlikely that Congress intended its amendments also to weaken section 9. 101 Moreover, despite its move to ease the impact of ESA on “critical” federal projects following TVA v. Hill, Congress did not alter the basic prohibition of section 7: the mandate to avoid projects that will result in the “destruction or adverse modification” of the habitat of an endangered species. 102 Another indication of the validity of the regulations’ definition of “harm” is that Congress, in enacting the 1978 amendments, did not legislatively overrule the definition. By leaving the definition of “taking” unchanged, Congress impliedly approved of the Fish and Wildlife Service’s definition. 103

That Congress intended section 9 to be strictly and literally construed does not mean, however, that the section is without limits, and that it will lead to the absurd results feared by critics such as Justice Powell. The Act requires a reasonable construction, 104 and the term “significantly” in the regulations prevents application of section 9 to actions that do not have a substantially detrimental effect on the habitats of endangered species. 105 The question of where to draw the line

98. 16 U.S.C. § 1531(a), (b) (Supp. IV 1980).
101. As originally enacted, ESA contained no provision for allowing any exemptions from Section 7. The Supreme Court’s strict interpretation of ESA in TVA v. Hill, see supra text accompanying notes 97-98, led Congress to add an exemption procedure “to give section 7 the flexibility that was missing when TVA v. Hill was decided.” Erdheim, supra note 6, at 637; see also 2d Sess. 2-3 (1978). For a summary of the exemption provisions, see Erdheim, supra, at 637-38, 637 n.73.
102. Erdheim, supra note 6, at 636, 642.
104. 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 49.09, at 256 (4th ed. 1973) (“Where a statute has received a contemporaneous and practical interpretation and the statute as interpreted is reenacted, the practical interpretation is accorded greater weight than it ordinarily receives, and is regarded as presumptively the correct interpretation of the law”); Erdheim, supra note 6, at 636.
105. Sierra Club v. Froehlke, 534 F.2d 1289, 1304 (8th Cir. 1976).
106. Practical considerations ensure that section 9 will not be used to enjoin activities that have only minor effects upon endangered species. Environmental plaintiffs are not likely to expend their limited resources challenging minor violations of section 9. Moreover,
between significant and insignificant effects must be decided on an ad hoc basis, depending on the facts of each case.

Although the court's finding in Palila that feral sheep were causing "significant" damage to the mamane-naio forest seems reasonable, some may question whether the remedy provided was necessary to prevent significant harm. The ruling that all feral sheep had to be removed to prevent harm to the Palila seems extreme; the court might rather have permitted a small number of sheep to remain. While a small flock might not have a significant adverse effect on the Palila's habitat, however, the trial court realized that a small flock would not stay small for long, due to the defendants' "demonstrated susceptibility" to hunter pressure. The trial court and the court of appeals justifiably concluded that all feral sheep had to be removed to ensure the Palila's safety and to end permanently the violations of section 9.

B. Treaty Power and Commerce Clause Power

The defendants in Palila challenged application of ESA to the Palila, arguing that the commerce clause did not grant Congress the authority to enact federal legislation concerning the species, since the Palila neither moves interstate nor inhabits federal lands. The trial court dismissed the argument, holding that application of ESA to the Palila was authorized by the powers of Congress both to legislate in furtherance of international treaties and to regulate interstate commerce.

1. The Treaty Power

The trial judge upheld ESA's application here partly on the basis of the treaty power. The Constitution authorizes the president to enter into treaties with foreign nations, which become "the Supreme

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108. See supra text accompanying note 81.
110. U.S. CONST. art. I, § 8, cl. 3 states that "[t]he Congress shall have the power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes."
111. 471 F. Supp. at 992.
112. Id. at 999.
113. Id. at 995.
114. "[The President] shall have the Power, by and with the Advice and Counsel of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. CONST. art. II, § 2, cl.2. See also Flota Maritima Browning De Cuba, Sociedad Anonima v. Motor Vessel Cindad De La Habana, 335 F.2d 619, 623 (4th Cir. 1964) (conduct of foreign affairs is a function of the Executive); Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769, 773 (D.D.C. 1974) (conduct of foreign relations is solely the President's job).
Law of the Land" by virtue of the supremacy clause. ESA expressly declares that one of its purposes is to meet the obligations of the United States pursuant to several international treaties and agreements. The Palila is a subject of two international treaties: the Migratory Bird Treaty with Japan, which requires the United States to “take appropriate measures to preserve and enhance the environment” of the birds covered by the treaty, including the Palila, and the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, which requires the United States to take affirmative action to protect all species listed in the Annex to the Convention. The Palila is named in the 1970 list of endangered species prepared by the Department of the Interior for inclusion in the Annex.

Missouri v. Holland established that Congress may enact legislation in furtherance of a valid treaty if the matter is of national concern, even though Congress would lack regulatory authority in the absence of the treaty. The above treaties seem clearly to be valid as required under the Holland decision. The protection of endangered species is a legitimate subject for international treaties, because the value to mankind of the genetic diversity of species is appropriately a matter of international concern. Further, legislation in pursuance of these treaties would be a matter of national concern, as required by Holland. ESA expressly states that endangered species “are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.” The Supreme Court in TVA v. Hill emphasized  

115. U.S. Const. art. VI.  
118. Id., 25 U.S.T. at 3382.  
120. Id., 56 Stat. at 1366.  
121. Department of the Interior, List of Species to be Included for the United States of America in the Annex to the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (attachment to letter from Leslie L. Glasgow, Assistant Secretary of the Interior, to William P. Rogers, Secretary of State, October 20, 1970).  
122. 252 U.S. 416 (1920) (opinion by Holmes, J.).  
123. As one author has noted: Diversity of species enriches human life and culture in a number of ways, both tangible and intangible. Diversity of species provides tangible ecological benefits . . . [and] tangible economic benefits. For example, various plant species are used today in making prescription drugs, supplying new sources of food, and producing hydrocarbons to replace imported oil. Further, that many species have not been evaluated for potential exploitation indicates that a great many undiscovered sources of immediate and future benefit to humans may be available through species preservation. Erdheim, supra note 6, at 629-30 (footnotes omitted).  
the importance of such species to the nation, and at least one commentator has stressed Congress’s dominant purpose of preserving “national and worldwide wildlife resources” and avoiding “the irreplaceable loss to . . . the national heritage” which species extinction entails.

2. The Commerce Power

Although the trial judge found that the treaty power was sufficient to support ESA’s application in Palila, he nevertheless examined a second source of constitutional authority for the Act: the power of Congress to regulate interstate and foreign commerce. The judge reasoned that the existence of “a national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species and the interstate movement of persons, such as amateur students of nature or professional scientists who come to a state to observe and study these species . . . .”

The reach of the commerce clause has expanded steadily since the New Deal era. The Supreme Court has stated that the commerce power “is as broad as the economic needs of the nation.” One commentator has gone so far as to say that “the outer limit of the power is a question for the political judgment of Congress rather than for the ac-

126. 437 U.S. at 174-88.
128. 471 F. Supp. at 994. There are three other theories often advanced by commentators in support of a federal power to protect endangered wildlife. One of these, mentioned in a footnote in the Palila opinion, is based on the notion that wildlife is federal property. Id. at 995 n.40. See also Coggins v. Hensley, Constitutional Limits on Federal Power to Protect and Manage Wildlife: Is the Endangered Species Act Endangered? 61 IOWA L. REV. 1099, 1137 (1976). However, the federal property theory is not clearly defined. See Hughes v. Oklahoma, 441 U.S. 322 (1979) (dealing with state ownership of wildlife); Baldwin v. Montana Fish & Game Commission, 436 U.S. 371 (1978) (dealing with state ownership of wildlife at times living on federal land); see also 471 F. Supp. at 992 for a discussion of the conflicting dicta in the cases. More importantly, the theory would not apply to the Palila, since the species inhabits only state lands.

A second theory, not mentioned in Palila, involves the power of Congress to provide for the “general welfare” of the nation. U.S. Const. art. I, § 8, cl. 1. See generally Rosenthal, The Federal Power to Protect the Environment: Available Devices to Compel or Induce Desired Conduct, 45 So. CAL. L. Rev. 397, 403 (1972); see also T. LUND, AMERICAN WILDLIFE LAW 48-49 (1980).

A third theory, also not discussed in Palila, is based on the inherent power of Congress to protect a symbol of our national heritage. See, e.g., Coggins & Hensley, supra, at 1139-43; T. LUND, supra, at 46-47, 49-50. It would be difficult to argue, however, that the Palila is a symbol of national heritage.

129. 471 F. Supp. at 995.
130. See T. LUND, supra note 128, at 49-50.
Although the commerce power is thus acknowledged to be one of the broadest powers granted to Congress by the Constitution, the application of the commerce clause by the trial court in *Palila* is not unassailable. Prior to the 1930's, Congress sought to avoid judicial scrutiny of the commerce power as it related to wildlife legislation, and instead based its legislation upon the treaty power.

The trial court found two bases for Congress's invocation of the commerce power: first, the national program to protect the Palila preserves the possibility of its entering interstate commerce; second, the interstate movement of persons studying the species brings it into the realm of interstate commerce. A third possible basis is the class theory, which posits that when a purely intrastate activity falls into a class of activities that together have a substantial effect on interstate commerce, that intrastate activity is subject to the commerce clause. As will be seen, no theory in isolation is clearly sufficient to justify application of the commerce power, but the latter two taken together provide a valid constitutional basis for ESA's application to the Palila.

a. The "possibility of future entrance" argument

The Palila is solely indigenous to Hawaii, and there is no evidence that it has ever moved interstate, either under its own power or by other means. The trial judge held that the congressional declaration of the importance of endangered species to the nation, coupled with a national program to protect the habitats of such species, preserved the possibility of the Palila's interstate movement.

Despite the present liberal view of the commerce clause, it is questionable whether the mere possibility that the Palila could someday enter interstate commerce supports placing it within the reach of the commerce clause. Any activity may someday affect the flow of inter-

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132. T. LUND, supra note 128, at 50.
133. *Id.* For example, in Wickard v. Filburn, 317 U.S. 111 (1942), the Court indicated that a purely local activity may be governed by Congress where the effect on interstate commerce makes such regulation an "‘appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.'" *Id.* at 124 (quoting United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942)). Congress may also regulate illegal activities under the commerce power. See Caminetti v. United States, 242 U.S. 470, 491 (1917).
134. See T. LUND, supra note 128, at 50.
137. *Id.*
139. See supra note 30 and accompanying text.
140. 471 F. Supp. at 995.
state commerce. To prevent extension of the commerce power to every human activity, Congress should be able to regulate only those activities that have some tangible, present effect upon interstate commerce.

b. Indirect effects of endangered species on interstate commerce

The trial court cited the case of Brown v. Anderson in support of the proposition that the interstate movement of persons studying endangered species brings the species within the commerce power. In Brown, a federal district court struck down an Alaska statute that closed certain fishing areas to nonresidents, on the ground that it adversely affected the interstate movement of nonresident fishermen and thus intruded on Congress's commerce clause power. Although Brown is the only judicial statement of this theory, it has been cited with approval by at least one commentator. The Brown theory is especially applicable to the question here. Scientists, amateur birdwatchers, and U.S. Fish & Wildlife Service agents move interstate to study the Palila. The connection between the Palila and its students is no more tenuous than that between the fish and the fishermen in Brown. Although the catch limitation in Brown immediately infringed upon interstate commerce, whereas the “taking” of the Palila by Hawaii DLNR caused only a future infringement of interstate travel, both are equally compelling situations for invoking the commerce clause. In both cases, interstate commerce would be affected, and it would make no sense to force Congress to wait until the harmful effect actually occurred before taking remedial action. Indeed, there is an even stronger case for applying the commerce clause in the Palila case, where the threatened obstruction of interstate commerce entailed an irreversible injury: the total extinction of a species.

The “indirect effects” theory of Brown provides a stronger basis for applying the ESA to intrastate species than does the “future entrance” theory. However, since Brown is the only judicial authority for the proposition that interstate movement of wildlife users or observers brings the wildlife itself into the realm of interstate commerce, future litigants would be wise to advance additional arguments in support of the commerce power argument.

c. The “class” theory

Another possible basis for applying the commerce clause to endangered species is the “class” theory, first clearly enunciated in Perez v.

142. Id. at 103.
143. See NATIONAL WILDLIFE LAW, supra note 94, at 33.
144. Record at 165-66, Palila.
In that case, the Supreme Court held that a loanshark who only operated intrastate nevertheless fell into a "class," controlled by organized crime, that had a substantial effect on interstate commerce. The Court in *Perez* relied on an earlier case, *Wickard v. Filburn*, which held that a farmer who grew crops solely for his own use was subject to regulation under the commerce clause because the aggregate of all such farmers affected the nationwide demand for grain and therefore substantially affected interstate commerce. *Perez* did not distinguish those loan sharks who had no apparent connection to interstate crime. The Court simply stated that "[w]hen it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so." The only apparent limit is that the class must be described with "definiteness," and must affect interstate commerce in its "total incidence."

All of the requirements of *Perez* are met in *Palila*. The description of the class is definite—all species on the federal endangered and threatened species lists. The class as a whole seems to affect interstate commerce substantially: some endangered species move interstate, either on their own volition or as occupants of zoos, and there is an interstate and international black market for items derived from endangered and threatened species, such as alligator skins, exotic birds and their feathers, and ivory from elephant tusks. It could be argued, however, that only such species which directly affect interstate commerce should be included in the regulated class of endangered species; in other words, that such species are not in the same "class" under *Perez* as are other species. Yet this viewpoint would involve difficult or

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146. 402 U.S. 146 (1971). *See also* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); United States v. Darby, 312 U.S. 100 (1941); Houston, East & West Ry. v. United States (Shreveport Rate Case), 234 U.S. 342 (1914).
147. 402 U.S. at 147, 150.
149. *Id.* at 127-28.
150. 402 U.S. at 153.
151. *Id.* at 154 (citing Westfall v. United States, 274 U.S. 256, 259 (1926)).
152. *Id.* at 153.
153. *Id.* at 154.
154. *See* 50 C.F.R. § 17.11 (1981) for a list of endangered and threatened species and of their ranges.
156. *See, e.g.*, N.Y. Times, Nov. 26, 1978, at A69, col. 3 (international smuggling operation dealing in alligator hides nets over $1,000,000 annually).
158. *See, e.g.*, N.Y. Times, Mar. 22, 1978, at A16, col. 1 (international trade in elephant tusks); *see also* N.Y. Times, May 10, 1978, at A23, col. 5 (U.S. limits on imports of elephant tusk ivory). Even though there are other laws rendering these activities illegal, the commerce clause may still apply. *See supra* note 133.
impossible determinations of what constitutes "direct involvement in interstate commerce," and, in addition to creating administrative problems, such a procedure would be contrary to the forceful policies behind ESA.\textsuperscript{159} The class theory thus justifies applying the commerce power to all endangered species, even to those that have no direct connection to interstate commerce, like the Palila.

\section*{C. The Tenth Amendment Issue}

Although the district court opinion seemed to recognize possible tenth amendment\textsuperscript{160} challenges to ESA,\textsuperscript{161} its discussion addressed only the issues of whether Congress was operating under authority of the commerce power or the treaty power, and the court never analyzed the tenth amendment issues presented in the case. Those issues are whether ESA impermissibly "coerces" states into taking affirmative action "as states" and whether regulation of endangered and threatened wildlife residing solely within one state is a traditional and integral function of state government.

In \textit{National League of Cities v. Usery},\textsuperscript{162} the tenth amendment was held to create an exception to the commerce power where its exercise "impairs the States' integrity or their ability to function effectively in a federal system."\textsuperscript{163} The Court struck down 1974 amendments to the Fair Labor Standards Act (FLSA)\textsuperscript{164} that applied certain minimum wage and overtime provisions to the states. Specifically, \textit{Usery} held the FLSA amendments unconstitutional on the ground that they "directly displace[d] the States' freedom to structure integral operations in areas of traditional government functions."\textsuperscript{165}

In \textit{Palila}, the district court should have examined the question of whether regulation of endangered and threatened wildlife falls within the \textit{Usery} exception to the commerce power.\textsuperscript{166} This involves a two-
part analysis:167 (1) whether ESA coerces the states into taking affirmative action by regulating the "States qua States,"168 and (2) whether ESA intrudes into "integral" and "traditional" state functions. Usery found both elements present and did not precisely state whether one alone would be decisive,169 but the Court recently held that both must be present to find a tenth amendment violation.170

As to the first of these issues, a strong argument can be made that ESA regulates the states "as states." The district court interpreted ESA to require that the Hawaii DLNR remove the feral sheep and goats and the Act thus forced the state to take affirmative action as a state. This is precisely the type of "coercion" forbidden by Usery and an earlier case, Steward Machine Co. v. Davis.171 It seems impossible to characterize the injunctive relief in Palila any other way. At a minimum, the injunction required the Hawaii DLNR to liberalize hunter bag limits;172 and at most, it required the DLNR to eradicate any remaining animals by hiring hunters to track them down in helicopters.173 Both of these alternatives require use of state powers in carrying out an affirmative action. In this respect, ESA fails the first half of the Usery test outlined above, at least as construed by the trial court. Therefore, for ESA to survive a tenth amendment challenge to its commerce power basis in a situation like Palila, protection of endangered species must not be found to be a traditional and integral state function.

The issue of whether endangered wildlife regulation is a "traditional" and "integral" state function under Usery seems conceptually


168. 426 U.S. at 847.


171. 301 U.S. 548 (1937). In Steward Machine, the Court rejected a tenth amendment challenge to Title IX of the Social Security Act on the ground that it did not require states to take affirmative action. The holding in Steward Machine seems "to tolerate any federal influence on the states short of a direct command to take legislative action." Development, supra note 167, at 582.

172. See Palila v. Hawaii Dep't of Land & Natural Resources, 639 F.2d at 497.

173. See id. at 496, 497.
difficult, but in reality is a much easier question. Certainly it can be argued that regulation of wildlife in general is a traditional state function. Further, such wildlife regulation arguably falls into Usery's list of traditional and integral functions, which included " parks and recreation" and other "activities . . . typical of those performed by state and local governments in . . . furnishing public services."\(^{174}\)

The argument is much stronger for a negative finding on this issue, however, since protection of only endangered and threatened wildlife is the subject of regulation. Although Usery did not provide a clear test for determining which activities are "integral" and "traditional," the opinion focused on those activities commonly acknowledged to be within the police powers of the state.\(^{175}\) Most of these activities "protect the community from serious harm, such as death, injury, or loss of property."\(^{176}\) The remainder of the activities are integral to the operation of state governments, both economically and structurally.

Protection of endangered wildlife, on the other hand, is of importance to the nation as a whole.\(^{177}\) Further, it is an activity that requires a uniform national standard to be successful, as Justice Blackmun's concurring opinion in Usery indicated. Justice Blackmun stated that the majority opinion "does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."\(^{178}\) Justice Blackmun thus is suggesting a balancing test be used as a means of resolving these tenth amendment issues.

When this balancing test is applied to ESA, the result favors uniform federal legislation for protection of endangered species rather than leaving this critical need open to the vagaries of each state's individual perceptions.\(^{179}\) Although ESA may well impermissibly "coerce" a state into taking affirmative action as a state, it does not interfere with a traditional and integral state function. The Act is therefore valid under the tenth amendment.

\section*{D. The Eleventh Amendment}

The eleventh amendment\(^{180}\) has been interpreted by the Supreme

\(^{174}\) 426 U.S. at 851.
\(^{175}\) The opinion listed "such areas as fire prevention, police protection, sanitation, public health, and parks and recreation." 426 U.S. at 851.
\(^{176}\) Development, supra note 167, at 591.
\(^{177}\) See supra note 123 and accompanying text.
\(^{178}\) 426 U.S. at 856 (Blackmun, J., concurring).
\(^{180}\) The eleventh amendment states that "[t]he Judicial power of the United States shall
Court as securing sovereign immunity for the states, so that a non-consenting state cannot be sued in a federal court by its own citizens or by citizens of another state. Before the amendment was adopted many feared that Article III, which extended the judicial power to "controversies between a State and citizens of another State," would allow private suits to enforce state war debts. This fear became a reality in *Chisholm v. Georgia*, which, relying on this provision in Article III, allowed such a suit by an individual against the State of Georgia. The states' reaction to this case was fierce and quite soon after the decision, the Eleventh Amendment was ratified.

Although the State of Hawaii was not itself named a party in *Palila*, the suit in federal court against the Hawaii DLNR and against its chairman was arguably barred by the eleventh amendment. Because a suit against the DLNR raises issues different from those in an action against the chairman, they are examined separately here.

1. The Chairman as a Defendant

The district court in *Palila* allowed the suit against the DLNR chairman by relying on *Ex Parte Young*, which permitted a suit to enjoin a state official from acting in violation of the federal constitution. In *Ex Parte Young*, the State Attorney General objected to suit not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.


While the Amendment's language does not bar suits against a state by its own citizens, the Supreme Court has consistently held that a non-consenting state is immune from suits brought in federal courts by its own citizens as well as by citizens of another state. *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974) and sources there cited.


184. Nowak, supra note 181, at 1426.

185. 2 U.S. (2 Dall.) 419 (1793). In *Chisholm*, the Supreme Court took original jurisdiction over a suit by the administrator of a South Carolina estate against the State of Georgia for collection of debts on supply contracts from the Revolutionary War. Georgia refused to appear, contending that the Court had no power to hear the case, but the Court disagreed, and entered a default judgment against the state. *Id.* at 480.

186. For instance, the Georgia House of Representatives passed a bill making any attempt to carry out the Court's judgment a felony punishable by hanging. Tribe, supra note 181, at 683.


188. In *Ex Parte Young*, the Supreme Court allowed a suit enjoining the Attorney Gen-
on the ground that it would have prohibited the official's enforcement of state statutes, and was therefore in effect a suit against the state prohibited by the eleventh amendment. The Court rejected this argument, reasoning that the official's "use of the name of a state to enforce an unconstitutional act . . . is a proceeding without the authority of . . . the state." Therefore, when a state official acts unconstitutionally, he is "stripped of his official or representative character" and is personally subjected to the consequences of his individual conduct. Since the suit is then not against the state but against an individual, it is not barred by the eleventh amendment.

The officer in *Ex Parte Young* was stripped of his official status because his conduct violated the Constitution, but the Supreme Court has since suggested that such a loss of official status may also result from actions taken in violation of federal statutes. Thus the fact that *Palila* involves violation of a federal statute rather than a constitutional provision should not preclude application of the rule of *Ex Parte Young*.

Even though a suit against a state official to enjoin a violation of federal law is generally not barred by the eleventh amendment, relief that amounts to a money judgment will still be barred, at least where it is likely that the state will have to satisfy the award. The rationale for this exception to *Ex Parte Young* is that a judgment which amounts to an award of damages is in effect a judgment against the state itself, rather than against a state official. The trial court decree in *Palila*, which required that Hawaii pay for removal of the feral sheep, may seem akin to awarding a money judgment. Supreme Court precedent, however, shows that such a decree is not barred by the eleventh amendment. In *Milliken v. Bradley*, the Supreme Court upheld a district court order requiring state officials to bear half the cost of programs

189. *Id.* at 155-156.
190. *Id.* at 159-60.
191. *Id.* at 160.
192. *Id.* at 159-60.
194. Indeed, the extension of *Ex Parte Young* to include violations of federal law seems a necessary step in view of the supremacy clause's mandate that federal laws join the Constitution and treaties as "the supreme Law of the Land." U.S. CONST. art. VI, cl.2.
196. *Id.* (quoting *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945)).
197. See *supra* text accompanying note 81.
implemented to compensate for and remedy de jure segregation in the Detroit school system.\textsuperscript{199} Since the programs involved were prospective in nature and not compensation to victims of past wrongs,\textsuperscript{200} the Court approved the remedy notwithstanding its effect on the state treasury.\textsuperscript{201}

The \textit{Milliken} decision clarified and extended \textit{Edelman v. Jordan},\textsuperscript{202} a case which had disallowed an award of retroactive money damages to persons injured by unconstitutional state welfare regulation.\textsuperscript{203} \textit{Edelman} distinguished retroactive money damages from costs ancillary to an equitable injunction,\textsuperscript{204} holding the latter to be justified as merely a necessary result of compliance with decrees "prospective in nature."\textsuperscript{205} Because the injunction in \textit{Palila} was also prospective, \textit{Edelman} seems to allow such relief. However, the relief granted in \textit{Edelman} was a "negative injunction"—that is, an injunction not to perform a specified act—and the decision might be limited to such relief. The injunction in \textit{Palila} might be characterized as a negative order—prohibiting the violation of ESA—but such a characterization is unlikely in light of the \textit{Palila} court order requiring the DLNR chairman to take affirmative action to eradicate any feral sheep remaining on Mauna Kea.\textsuperscript{206} It is probably unlikely, however, that \textit{Edelman} would be limited to only "negative" injunctions, since the distinction between negative and affirmative injunctions is largely semantic.\textsuperscript{207} Further, even if the \textit{Palila} order is not authorized by \textit{Edelman}, it is clearly within the rule of \textit{Milliken}.

The progression from \textit{Ex Parte Young} to \textit{Edelman} and \textit{Milliken} demonstrates a trend in eleventh amendment cases toward allowing more suits and more kinds of relief, prohibiting only the award of dam-

\textsuperscript{199} Id. at 288-90.
\textsuperscript{200} Id. at 290 n.21.
\textsuperscript{201} Id. at 289-90.
\textsuperscript{202} 415 U.S. 651 (1974). In \textit{Edelman}, the plaintiffs in a class action suit against Illinois officials in charge of distributing federal welfare aid sought and obtained an injunction preventing the officials from administering the program under Illinois regulations that were contrary to federal regulations. Id. at 653-59. The district court also granted to the plaintiffs the retroactive benefits wrongfully denied them, and the court of appeals affirmed both awards. Id. The Supreme Court upheld the injunction, but vacated the award of retroactive benefits. Id.
\textsuperscript{203} Id. at 663-71. The Court held that the relief would "impose a liability which must be paid from public funds in the state treasury," id. at 663, and was therefore barred by the eleventh amendment, because it would be akin to a money damages award against the state. Id. at 663-71. In so holding, the Court rejected the argument that the retroactive award was one not of damages but of "equitable restitution." Id. at 665.
\textsuperscript{204} Id. at 667-68.
\textsuperscript{205} Id. at 668.
\textsuperscript{206} See supra text accompanying note 81.
\textsuperscript{207} For example, it would take little manipulation to make the \textit{Edelman} relief appear affirmative—the relief could be viewed as requiring the administration of welfare in conformance with federal regulations and with the fourteenth amendment.
ages to individuals "for an accrued monetary liability." This trend is consistent with commentators' theories that the eleventh amendment was passed primarily to bar suits against the fledgling states for money debts incurred during the Revolutionary War period. Thus, in its continuous refining of the boundaries of eleventh amendment immunity the Court appears to be narrowing that immunity to its original purpose of barring suits against states as debtors; suits outside this original purpose, such as Palila, will more likely be allowed.

2. The State Agency Defendant

The Palila trial court also ruled that the eleventh amendment did not bar suit against the Hawaii DLNR. This ruling, of course, could not have been based on Ex Parte Young, which allowed suits only against state officials. Rather, the Palila court treated the suit against the DLNR as a suit against the state itself, as have other courts considering an action brought against a state agency. Hence the suit would be barred by the eleventh amendment, unless either (a) Congress, by enacting ESA, abrogated the eleventh amendment immunity of the states in suits brought under the Act (regardless of state consent to be sued), or (b) the state of Hawaii impliedly consented to suit by participating in the federal program, if ESA intended to abrogate eleventh amendment immunity of participating states.

a. Congressional abrogation of eleventh amendment immunity

In Fitzpatrick v. Bitzer, the Supreme Court held that Congress, when acting pursuant to section 5 of the fourteenth amendment, may abrogate the eleventh amendment immunity of the states, even so as to award damages against them, whether or not the states consent to such

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209. See supra note 184 and accompanying text.
210. 471 F. Supp. at 999.
211. Id. at 996.
213. See generally P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 926-37 (2d ed. 1973), 212-33 (1981 Supp.) [hereinafter cited as HART & WECHSLER]. An express waiver by the state of its eleventh amendment immunity may also be found in the absence of congressional intent to abrogate such immunity, id. at 231 (1981 Supp.), but there is nothing here to suggest that Hawaii expressly waived its immunity.
215. Section 5 gives Congress "power to enforce, by appropriate legislation, the provisions of [the fourteenth amendment]." U.S. CONST. amend. XIV.
abrogation by submitting to or participating in the federal legislation.\textsuperscript{216} The Court adopted in part the view of Professor Tribe\textsuperscript{217} that the eleventh amendment does not pose an absolute bar to federal jurisdiction over suits against states, but rather allows jurisdiction only where Congress clearly intended to allow its exercise.\textsuperscript{218} However, \textit{Fitzpatrick} was limited to federal legislation enacted pursuant to section five of the fourteenth amendment,\textsuperscript{219} and it is quite possible that the Supreme Court would not extend the decision to legislation enacted under other legislative powers.\textsuperscript{220}

Because ESA was enacted pursuant to the commerce power rather than the fourteenth amendment,\textsuperscript{221} the above decisions do not expressly apply to the Act. However, since the Supreme Court's recent decisions under section five of the fourteenth amendment arguably show a trend in the direction of allowing congressional abrogation of state immunity even without express or implied consent of the states, the district court in \textit{Palila} could have been justified in anticipating the Supreme Court's extension of those cases to commerce clause legislation.\textsuperscript{222} Further, \textit{Fitzpatrick} went so far as to allow damages (and not just prospective or injunctive relief) in fourteenth amendment suits. Such a judicial attitude—one hostile to the eleventh amendment bar—may foreshadow a willingness to allow injunctive (though not damages) suits against the state itself pursuant to commerce clause legislation.

The district court in \textit{Palila} did not clearly indicate whether it sought to rely on the above cases to find abrogation in the absence of state consent to be sued, or whether it relied on the similar doctrine, discussed below,\textsuperscript{223} permitting the exercise of federal jurisdiction over the states where both a congressional intent to abrogate the immunity

\textsuperscript{216} \textit{Fitzpatrick}, 427 U.S. at 456.
\textsuperscript{218} See \textit{Fitzpatrick v. Bitzer}, 427 U.S. at 456. \textit{See also Hart & Wechsler, supra note 213, at 229 (1981 Supp.).}
\textsuperscript{219} Fitzpatrick v. Bitzer, 427 U.S. at 448, 452-56. \textit{See also Hart & Wechsler, supra note 213, at 230 (1981 Supp.).}
\textsuperscript{220} \textit{See Hart & Wechsler, supra note 213, at 229-30 (1981 Supp.).}
\textsuperscript{221} See \textit{supra} text accompanying notes 128-60.
\textsuperscript{222} The district court did not expressly purport to anticipate the Supreme Court's extension of \textit{Fitzpatrick} to commerce clause legislation. It did, however, reject an attempt to distinguish \textit{Milliken} v. Bradley, 433 U.S. 267 (1977), on the asserted ground that \textit{"Milliken involves a Fourteenth Amendment violation and is, therefore, within the Fourteenth Amendment exception to the Eleventh Amendment carved out in the case of Fitzpatrick."} 471 F. Supp. at 996 n.46. The district court rejected the distinction by noting that \textit{"the Supreme Court in Milliken explicitly refrained from addressing the issue of whether the Fourteenth Amendment works a pro tanto repeal of the Eleventh Amendment."} \textit{Id.} (citing \textit{Milliken} v. Bradley, 433 U.S. at 291 n.23).
\textsuperscript{223} See Part D.2.b. \textit{infra}. 
and the state’s consent to this abrogation are found.\textsuperscript{224} Under each of these doctrines, of course, an inquiry into the congressional intent to abrogate eleventh amendment immunity is necessary. The \textit{Palila} district court identified three ways in which such an intent may be found.\textsuperscript{225} First, Congress may expressly abrogate, by authorizing suits against “a general class of defendants which literally included States or state instrumentalities.”\textsuperscript{226} Congressional abrogation of immunity may also be found by examining the legislative history if the legislation in question “focuses ‘directly on the issue of state liability.’”\textsuperscript{227} Finally, implied intent to abrogate may be found where “the statute would be rendered meaningless with respect to states if liability were not imposed,”\textsuperscript{228}—that is, where the preservation of immunity “would lead to a right without an effective remedy.”\textsuperscript{229}

The language and legislative history of ESA support a finding of congressional abrogation. Section 11(g) of the Act\textsuperscript{230} expressly authorizes private suits against all “persons”\textsuperscript{231} who violate the ESA, “including the United States and any other governmental instrumentality or agency (to the extent permitted by the Eleventh Amendment to the Constitution) . . . .”\textsuperscript{232} The Act also specifically defines “person” to include state agencies.\textsuperscript{233} These sections therefore suggest that Congress intended to allow private suits against states and state agencies.

A possible alternative to this interpretation is based on section 11’s parenthetical and vague reference to the eleventh amendment.\textsuperscript{234} The trial judge interpreted this reference as relating only to the scope of injunctive relief, so as to bar relief tantamount to money damages.\textsuperscript{235} Considering the urgency of the plight of endangered species and the grave concern Congress attached to this legislation,\textsuperscript{236} the trial judge’s interpretation of the eleventh amendment reference in section 11(g) is reasonable. If the states’ eleventh amendment immunity were preserved, section 11(g) would create a right of action against the states while denying a judicial remedy for that right. Confronted with a simi-

\textsuperscript{224} See 471 F. Supp. at 996-99.
\textsuperscript{225} 471 F. Supp. at 997.
\textsuperscript{226} \textit{Id.} (citing Edelman v. Jordan, 415 U.S. 651, 672 (1974)).
\textsuperscript{227} \textit{Id.} (quoting Hutto v. Finney, 437 U.S. 678, 698 n.31 (1978)).
\textsuperscript{228} \textit{Id.}
\textsuperscript{229} \textit{Id.}
\textsuperscript{230} \textit{Id.} (citing Parden v. Terminal Railway, 377 U.S. 184, 190 (1964)).
\textsuperscript{231} 16 U.S.C. § 1540(g) (1976).
\textsuperscript{232} “Person” is defined by 16 U.S.C. § 1532(13) (Supp. IV 1980) to include any “officer, employee, agent, department, or instrumentality of . . . . any State.”
\textsuperscript{234} See note 231 \textit{supra}.
\textsuperscript{235} See \textit{supra} text accompanying note 232.
\textsuperscript{236} 471 F. Supp. at 997.
lar situation in *Parden v. Terminal Railway,*\(^\text{237}\) the Supreme Court concluded that Congress could not have intended "so pointless and frustrating a result."\(^\text{238}\) It might be argued that an alternative remedy is authorized in section 11, allowing citizens "to compel the Secretary [of the Interior] to apply . . . the prohibitions with respect to the taking of any resident endangered species . . . within any State."\(^\text{239}\) This remedy is inadequate, however, because it allows the Secretary to act only with respect to a "taking," and not with respect to any of the other prohibited activities of section 9.\(^\text{240}\) The subsection seems primarily concerned with emergency situations arising under the "establishment period"\(^\text{241}\) in the cooperative agreements provision\(^\text{242}\) and is not meant to supersede private suits as mechanism of enforcing ESA. Given the importance of private suits to the Act,\(^\text{243}\) Congress must have intended to abrogate immunity.

### b. State consent to suit by participating in ESA

Even if the doctrine of *Fitzpatrick* were not extended to commerce clause legislation, several Supreme Court cases indicate that a state’s participation in or subjection to a federal statute that intends to abrogate immunity upon state participation will constitute a waiver of immunity.\(^\text{244}\) Congress’ intent to abrogate immunity in suits under ESA has been demonstrated in the previous discussion,\(^\text{245}\) so the issue becomes whether the state of Hawaii had impliedly waived its immunity by participating in the administration of ESA.

In *Parden v. Terminal Railway,*\(^\text{246}\) the Supreme Court found congressional abrogation of the State’s immunity and constructive consent by the state to suit. Consent was found by the State’s ownership and operation of a railroad which was subject to the Federal Employer’s

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238. *Id.* at 190.
242. 16 U.S.C. § 1535(c) (1976 & Supp. IV 1980). This section allowed a suspension of the "taking" provisions of the Act, as applied to most species, during a period of up to fifteen months from the Act’s enactment, allowing states time to draft and enact programs to qualify for the cooperative agreement funds the federal government was offering under 16 U.S.C. § 1535(d) (1976). While the taking provisions were thus generally not enforceable during this period, the Secretary of the Interior was authorized to determine if an emergency "posing a significant risk to the well-being of [an endangered species]" existed, *id.* § 1535(g)(2)(B)(ii) (1976), in which case the Secretary could enforce the taking provisions for a 90-day period, *id.*
243. See Lachenmeier, *supra* note 93, at 76.
245. See *supra* Part D.2.a.
Since FELA had been in effect for over 20 years before Alabama began operation of the railway, the Court found that the State had "necessarily consented" to suits brought under the Act, by voluntarily participating in an activity governed by it.\(^\text{248}\)

Using this *Parden* analysis, the *Palila* trial judge found that Hawaii's attempt to take advantage of the cooperative agreement provisions of the ESA,\(^\text{249}\) by passing the Hawaiian Endangered Species Act,\(^\text{250}\) constituted consent to be sued under the federal Act.\(^\text{251}\) The judge noted the Hawaii Act's adoption of specific language from the federal act.\(^\text{252}\)

The *Palila* court found consent despite significant factual differences between *Palila* and *Parden*. In *Parden*, the operation of the railway was not an activity typically undertaken by government, but rather one more akin to private enterprise.\(^\text{253}\) *Palila*, on the other hand, involved wildlife regulation and protection, activities presumably not undertaken for profit. *Palila* did not even involve actual participation in a federally created activity, but only an attempt to participate.\(^\text{254}\) The unsuccessful attempt to participate is more analogous to a failure to make any attempt than it is to actual participation. The anomalous result of the *Palila* court's reliance on *Parden* was a finding of consent based solely on the state continuing to operate in a field where it had long operated, and which was only recently made subject to federal regulation.

It would be fair to conclude that the trial court's finding of constructive consent was not warranted under *Parden*. Nevertheless, Professor Field has argued that the Court has indicated a willingness to impute state consent wherever a congressional intent to abrogate eleventh amendment immunity has been found.\(^\text{255}\) Further, as noted above,\(^\text{256}\) both Congressional abrogation of immunity and state consent to suit may not be prerequisites to lifting the eleventh amendment bar. This possibility is suggested by the recent decisions in *Employees v. Department of Public Health*\(^\text{257}\) and *Edelman v. Jordan*.\(^\text{258}\) *Employees v.*
Department of Public Health found a state immune from suit in federal courts to enforce the Fair Labor Standards Act (FLSA) with respect to employees in state health facilities. Employees was decided on the question of congressional intent to abrogate; therefore, any references to the consent requirement are dicta. These dicta, however, indicate that the Court would limit the conjunctive requirements of Parden to the peculiar facts of that case. In several passages in the opinion, Employees implies that the sole bar to allowing private suits against the states under FLSA was the lack of congressional intent to abrogate the states’ immunity. While the Court’s failure to acknowledge that consent by the state is also necessary could have been oversight, Employees may indicate a willingness to hold that no finding of the state’s consent is needed to lift state immunity once congressional abrogation is shown.

Edelman v. Jordan held that the eleventh amendment barred federal court suits to recover damages for illegal state administration of a federal welfare program. The Court again found that Congress had not intended to lift the states’ immunity in the legislation in question. As in Employees, passages in the Court’s opinion suggest that consent is not required if abrogation is found. However, some language in Edelman seems expressly to reject the theory that abrogation alone is enough to lift eleventh amendment immunity. Thus the Court stated that “waiver . . . under the Eleventh Amendment . . . [depends] on whether Congress had intended to abrogate . . . and whether the State . . . had in effect consented.”

260. 411 U.S. at 285.
261. The Court held that, although the FLSA did apply to states, 411 U.S. at 283, Congress did not intend to allow private suits against the states. Id. at 285. The Court went on to note that this would not leave state employees without a remedy, since section 16(c) of the Act, FLSA, 29 U.S.C. § 216(c) (1976 &., as amended, Supp. IV 1980) gave the Secretary of Labor authority to bring suit for them. Id. at 286.
262. The Employees opinion distinguished Parden by noting that the state railroad in that case was a profit-oriented business in an “area where private persons and corporations normally ran the enterprise.” 411 U.S. at 284. The Court also stated that the “dramatic circumstances of the Parden case, which involved a rather isolated state activity” could be ignored in considering the public sector employees affected in Employees. Id. at 285.
263. For instance, the Court at one point stated: “Where employees in state institutions not conducted for profit have such a relation to interstate commerce that national policy . . . indicates that their status should be raised, Congress can act. And when Congress does act, it may place new or even enormous fiscal burdens on the States.” Id. at 284. See also id. at 283 (stating that “The question is whether Congress has brought the States to heel, in the sense of lifting their immunity from suit in a federal court . . . .”).
264. 415 U.S. at 678.
265. Id. at 671-74.
266. For instance, Edelman stated that the only question in Employees was whether the Act’s authorization of suits against a class included states in the class. Edelman v. Jordan, 415 U.S. at 674.
267. Id. at 672-73.
find waiver by the state only where indicated "‘by the most express language or by such overwhelming implications ... as [will] leave no room for any other reasonable construction.’"268 This rejection of constructive consent seems at odds with the opinion’s earlier acceptance of the Parden case, in which the Court had found constructive consent.269 The conflict can perhaps be resolved by noting that in Edelman, unlike Parden, “the threshold fact of Congressional [abrogation] is wholly absent.”270 The requirement of “express” and “overwhelming” indication of consent may thus be the standard for finding consent where no abrogation exists.271

If Employees and Edelman are taken to indicate that state consent to suit is not required once abrogation is found, a finding that Hawaii had lost its immunity is likely, since congressional intent to abrogate is fairly clear. Fear of reversal may have led the trial judge in Palila to follow the Parden rule requiring a finding of consent in addition to congressional intent to abrogate. In finding such consent, however, the court stretched the rule of Parden to fit the facts before it.

The court’s willingness to distort Parden is curious, since it was easy to find the suit properly stated against a state official. This observation raises the related question of whether it was advantageous for plaintiffs to name the Hawaii DLNR as a defendant. The type of relief sought from the state agency here would nearly always be available in an equitable action against state officials.272 Future litigants in similar situations might wish to avoid the more difficult eleventh amendment questions by bringing an action only against the state officials responsible for alleged violations of ESA.

IV.
CONCLUSION

The urgent need for extensive and effective protection programs for the world’s endangered and threatened species of wildlife demands forceful legislative action. The Endangered Species Act of 1973 is intended to be just such a forceful statute, as its legislative history indi-

268. Id. at 673 (quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909)).
269. 415 U.S. at 671-72.
270. Id. at 672.
271. Indeed, Edelman borrowed the standard from Murray v. Wilson Distilling Co., 213 U.S. 151 (1909), in which the question of waiver (arising there in liquidation proceedings) was whether the state had given up property rights to its statutory liquor commission. 213 U.S. at 170-71. Edelman’s reliance on Murray suggests that the Court was concerned with the question of state waiver generally rather than in conjunction with congressional abrogation of state immunity.

As noted above, it is well settled that states may expressly waive their eleventh amendment immunity independently of congressional abrogation. See supra note 213 and source cited therein.
272. See supra Part D.2.
icates. The Supreme Court, in *TVA v. Hill*, led the way in judicial determination to give ESA the strongest possible effect. *Palila* indicates that ESA remains strong, despite changes made by the 1978 amendments.

The *Palila* trial court opinion, however, went still further. By clearly specifying the origins of the federal power to regulate protection of endangered and threatened species, *Palila* lays to rest any notion that the states have exclusive control over endangered and threatened wildlife residing within their borders, even those species solely indigenous to one state. Although this aspect of *Palila* was not reviewed by the Ninth Circuit Court of Appeals, the trial court's reasoning is persuasive and should have much force as precedent.

The outcome of *Palila* should encourage states to take notice of their susceptibility to suit under ESA, and prompt them to take affirmative steps to avoid ESA violations within their own borders. If the states take an active role in protecting endangered species and their habitats, the goals of ESA will be furthered without resort to enforcement suits against the states.